(2)

No. 04-1246

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

MAURICE BESSINGER, *et al.*,

Petitioners,

v.

FOOD LION, LLC, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF HARRIS TEETER, INCORPORATED AND RANDY RASMUSSEN TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

I. Did the Fourth Circuit err in affirming the district court's dismissal, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, of Petitioners' claims that Respondents violated the South Carolina Unfair Trade Practices Act by discontinuing their business relationships with Petitioners?

II. Did the Fourth Circuit err in affirming the district court's denials of Petitioners' motions to remand on the basis that Petitioners fraudulently joined Respondents Bobby Dalton, Mike Graybeal, and Randy Rasmussen?

CORPORATE DISCLOSURE

Harris Teeter, Inc., is a wholly owned subsidiary of Ruddick Corporation. Ruddick Corporation is publicly traded on the New York Stock Exchange.

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SUP. CT. R. 15.2 1

The Petition in this case contains one material misstatement of law and one material misstatement of fact, each of which bears directly on whether this case should be accepted for certiorari. Respondents Harris Teeter, Inc. (hereinafter "Harris Teeter") and Randy Rasmussen (hereinafter "Rasmussen") contend that the opinion of the Fourth Circuit Court of Appeals, which incorporates by reference the opinion of the district court, is correct in all respects and amply demonstrates that a Writ of Certiorari would serve no useful purpose in this matter. While not purporting to be an exhaustive list of reasons certiorari should be denied, this Brief is respectfully submitted for the purpose of identifying the above-referenced misstatements of law and fact as required by SUPREME COURT RULE 15.2.

ARGUMENT

A. PETITIONERS' CONTENTION THAT THE FOURTH CIRCUIT'S INTERPRETATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT WAS "NOVEL" AND CONCERNED AN ISSUE OF "FIRST IMPRESSION" UNDER SOUTH CAROLINA LAW IS INCORRECT.

Petitioners repeatedly describe the Fourth Circuit's ruling as a novel and unprecedented departure from existing South Carolina law. (*See* Pet. for Cert. at i ("matter of first impression"); 4 ("[n]o South Carolina court had ever before considered analogous circumstances"); 5 (the Fourth Circuit made "novel rulings"); 10 (the Fourth Circuit "created new law for South Carolina . . . with no logical precedent").) It is principally on this basis that Petitioners seek

certiorari in this case, arguing that review is necessary to prevent the Fourth Circuit's ruling from altering the landscape of South Carolina law under the South Carolina Unfair Trade Practices Act, S.C. Code Section 39-5-10, *et. seq.* (hereinafter "SCUTPA"). However, Petitioners' characterization of the Fourth Circuit's ruling is grossly misleading inasmuch as it entirely ignores a key decision of the Supreme Court of South Carolina which is directly relevant to this case and was discussed in both Petitioners' and Respondents' briefs before the Fourth Circuit.

In *Camp v. Springs Mortgage Corp.*, 426 S.E.2d 304 (S.C. 1993), the Supreme Court of South Carolina affirmed the 12(b)(6) dismissal of a SCUTPA claim brought by a real estate attorney (Camp) against a mortgage corporation (Springs). Camp alleged that despite an existing relationship between the parties (including a pending contract to close a loan) Springs had essentially "blackballed" him by telling prospective borrowers that it would no longer participate in any loans with respect to which he was the closing attorney. *Id.* at 305. The court acknowledged that allegations against Springs amounted to interference with Camp's existing client relationships and that an inference could be drawn that such conduct was "without justification." *Id.* at 306. The court nevertheless found that no SCUTPA claim would lie as a matter of law, explaining that

> [t]he conduct complained of here does not describe any action by Springs that was "unfair" or "deceptive." The allegation that

> Springs told potential borrowers Camp was unacceptable fails to describe an unfair act in the conduct of trade or commerce. Camp's clients were free to choose a different lending institution if they wished to retain Camp as the closing attorney. Camp was not in competition with Springs nor did he have a right to represent its borrowers. Further, there is no deception alleged since Camp was told directly that Springs refused to deal with him on loan closings.

Id.

This holding is directly relevant to Petitioners' claims in this case. Like Camp, Petitioners have alleged that they were denied the opportunity to continue a business relationship with another party for illegitimate reasons. They contend that contrary to the Fourth Circuit's holding, SCUTPA should be interpreted to require a party to demonstrate "legitimate commercial justifications" before terminating a business relationship. (Pet. for Cert. at 20.) This is precisely the position that South Carolina's highest court rejected in *Camp* when it granted a Rule 12(b)(6) motion on a SCUTPA claim despite observing that the conduct at issue was "without justification." *Camp*, 426 S.E.2d 304, 306.

Given the binding effect of *Camp*, most of the discussion of SCUTPA in the Petition lacks persuasive

force. In particular, Petitioners' discussion of various federal cases predating *Camp* is irrelevant. (*See* Pet. for Cert. at 11-21). The Supreme Court of South Carolina has already considered whether SCUTPA requires a private party to offer "legitimate commercial justifications" for a refusal to do business with another private party and has definitively answered in the negative.

Harris Teeter and Rasmussen therefore take strong exception to the contention that the Fourth Circuit intruded into state law by deciding a novel issue or a matter of first impression. The Fourth Circuit's ruling was well within the bounds of the principles announced in *Camp*. As such, certiorari is not necessary to resolve any conflict between the Fourth Circuit's ruling and existing South Carolina law.

B. PETITIONERS' CONTENTION THAT RANDY RASMUSSEN WAS A STORE MANAGER DURING THE RELEVANT TIME PERIOD IS INCORRECT AND IS NOT SUPPORTED BY ANY COMPETENT EVIDENCE IN THE RECORD.

Petitioners contend that Respondent Randy Rasmussen was the store manager of a Harris Teeter store, and that in such capacity, he physically removed Petitioners' products from the shelves of the store. (Pet. for Cert. at 2, 3, 27 & n. 8; Complaint in C.A. No. 200-CP-10-3558 (hereinafter "App. A.") ¶ 12.) These assertions of fact are incorrect.

In analyzing fraudulent joinder, federal courts have acknowledged that it is appropriate to look beyond the pleadings. In *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), this Court observed that in assessing a fraudulent joinder claim "the issues so arising must be heard and determined by the District Court." *Id.* at 97. *See also, Smoot v. Chicago, Rock Island & Pacific Railroad Co.*, 378 F.2d 879, 881-82 (10th Cir. 1967) (citing *Wilson* for the proposition that "it is well settled that upon allegations of fraudulent joinder designed to prevent removal, federal courts may look beyond the pleadings to determine if the joinder, although fair on its face, is a sham or fraudulent device to prevent removal"); *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 462-63 (5th Cir. 2003) ("it is well established that the district court may 'pierce the pleadings' and consider summary judgment-type evidence"). The District of South Carolina is among the jurisdictions that have expressly applied this standard. *Carter v. Seaboard Coast Line Railroad Co.*, 318 F. Supp. 368, 372 (D.S.C. 1970) ("the Court may properly look beyond the pleadings themselves and inquire into the basis for the joinder").

Petitioners named Harris Teeter and Randy Rasmussen as Defendants in their state court action. (App. A. ¶¶ 3, 5.) They alleged that Rasmussen was the store manager at a Harris Teeter store on Long Point Road in Mount Pleasant, South Carolina, and that when Harris Teeter decided to discontinue Petitioners' products, it was Rasmussen who removed such products from the shelves. (App. A ¶ 12.) However, as the Fourth Circuit properly concluded, the individually-named Respondents in this case all were

fraudulently joined because none of them participated in the corporate decisions to discontinue Petitioners' products. (Pet. for Cert. at 6a-8a.)

An additional and far more fundamental basis exists for denying certiorari on the fraudulent joinder issue: at the time of the events alleged in Petitioners' Complaint, the store named in the Complaint was not in operation and Rasmussen was not a store manager in any Harris Teeter store. In connection with their removal papers and their Response to Petitioners' Motion to Remand, Harris Teeter and Rasmussen submitted the affidavits of Rasmussen and Harris Teeter's Senior Vice President of Human Resources C. Douglas Rhodes. (App. B (Rasmussen Aff.); App. C (Rhodes Aff.).) Rhodes testified that the store identified in the Complaint was not in operation until the year after the alleged removal of Petitioners' products. (App. C ¶ 5, 6.) Rasmussen testified that at the time of the events alleged in the Complaint, he worked at a different Harris Teeter store as a "co-manager," which is a subordinate position working under a store manager and having responsibility only for a designated portion of the store. (App. B ¶¶ 2, 3.) Rasmussen's responsibilities as a co-manager did not include the portion of the store where Petitioners' products were stocked. (App. B ¶ 4.) Rasmussen testified that he had no role whatsoever in any removal of Petitioners' products. (App. B ¶¶ 5, 6.)

Petitioners chose not to submit any evidence contesting these facts. They instead rested on the allegations of their Complaint. In view of the well established practice of looking beyond the pleadings,

Petitioners' failure to provide any factual support for the allegations set forth in their Complaint may fairly be deemed an admission. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921) (non-moving party's failure to respond to facts presented in support of fraudulent joinder claim amounted to "assenting to their truth"). Petitioners' allegations that Rasmussen was a "store manager" and that he physically removed Petitioners' products have been directly refuted. As such, there is no reasonable basis for disputing that recovery against Rasmussen is impossible. Granting certiorari on the fraudulent joinder issue would be pointless.

CONCLUSION

Petitioners' assertions that this case involves a novel issue of South Carolina law and that Randy Rasmussen was a store manager responsible for removing their products from the store shelves are false. Respondents Harris Teeter, Inc., and Randy Rasmussen respectfully submit that certiorari should be denied.

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Randy Rasmussen

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

MAURICE BESSINGER, and PIGGIE PARK ENTERPRISES, INC.,	)	
Plaintiffs;	)	Civil Action No. __
v.	)	
HARRIS TEETER, INC., and RANDY RASMUSSEN,	)	
Defendants.	)	

ATTACHMENT C

to

NOTICE OF REMOVAL

Copy of Complaint Filed In Case No. 03-CP46-2061

STATE OF SOUTH CAROLINA	)	IN THE
	)	COURT OF
COUNTY OF YORK	)	COMMON
	)	PLEAS
MAURICE BESSINGER, and	)	
PIGGIE PARK ENTERPRISES,	)	SIXTEENTH
INC.,	)	JUDICIAL
	)	CIRCUIT
PLAINTIFFS,	)	CASE NO. 03
	)	CP46-2061
-vs-	)	
	)	COMPLAINT
	)	(Jury Trial
HARRIS TEETER, INC.,	)	Demanded)
and JEFF LEWIS,	)	
	)	
DEFENDANTS.	)	
	)	
	)	

Plaintiffs respectfully allege as follows:

1. Plaintiff Maurice Bessinger is a resident of Lexington County, South Carolina.

2. Plaintiff Piggie Park Enterprises, Inc. is a corporation organized under the laws of the state of South Carolina, with its headquarters and principal place of business in Lexington County, South Carolina.

3. Upon information and belief, Defendant Harris Teeter, Inc. is a corporation

organized under the laws of the state of North Carolina, owning property and doing business in York County, in the state of South Carolina.

4. The issues in this case and the acts of the Defendant affect stores throughout the state. The impact and effect of the actions of the Defendant are targeted on the Plaintiffs in Lexington County, South Carolina, thus venue and jurisdiction are proper within this jurisdiction.

5. Upon information and belief, Defendant Jeff Lewis is the manager of the York County Harris Teeter, Inc. grocery store located at 725 Cherry Rd. Suite 110, Rock Hill, South Carolina 29730-3121 and was the manager who removed Plaintiffs' products from his store in September, 2000.

6. Upon information and belief, Defendant Jeff Lewis is a resident of York County, South Carolina. The impact and effect of the actions of Defendant Jeff Lewis are targeted on the Plaintiffs in York County, South Carolina, thus venue and jurisdiction are proper within this jurisdiction.

FACTUAL BACKGROUND

7. Plaintiff Bessinger is a native South Carolina businessman who operates a chain of barbeque restaurants and sells barbecue food products in stores. He is an officer and principal stockholder in Plaintiff Piggie Park Enterprises, Inc. Plaintiff Bessinger opened his first restaurant in Charleston, South Carolina in 1953. His business enterprise has expanded to eleven restaurants in the midlands area of South Carolina and a large bottling and packaging plant to mass produce barbecue sauce and meat for sales in stores.

8. Until September 2000, Plaintiffs had sold barbecue products continuously for over ten years in Defendant Harris Teeter, Inc. stores.

9. In July 2000, when the Confederate Battle Flag was lowered from the top of the South Carolina Capitol building, Plaintiffs began flying the Confederate Battle Flag at each of their barbecue restaurants. Plaintiffs were already flying the American Flag at their restaurants and continue to do so.

10. In August 2000 an article appeared in The State Newspaper by a staff columnist which was extremely critical of Plaintiffs

for flying the Confederate Battle Flag and for distributing religious literature at Plaintiffs' restaurants that was alleged to be controversial in nature.

11. The State Newspaper article was followed by a series of news media stories in print, and on radio and television concerning their perception of Plaintiff Bessinger's political and religious views with special emphasis on the Confederate Battle Flag controversy.

12. In September 2000, Defendant Harris Teeter, Inc. discontinued Plaintiffs' products. Subsequently, Defendant Jeff Lewis removed Plaintiffs' products from the shelves of the Harris Teeter, Inc. store located at 725 Cherry Rd. Suite 110, Rock Hill, South Carolina 29730-3121.

13. The sole reason that Plaintiffs' products were removed by the Defendants in this case was because of Plaintiff's individual political and religious views as expressed by him and publicized in the media. There has never been any allegation from the Defendants that Plaintiffs' products were not popular with consumers or of the highest quality.

14. There was no reference to Plaintiff's political or religious views on any packaging of Plaintiffs' barbecue

products. The only symbol with any political significance at all on Plaintiffs' packaging materials was a small American flag on the labels of his barbecue sauce. No Confederate Battle Flag even appeared on his barbecue product packaging.

CAUSE OF ACTION

(Violation of South Carolina Unfair Trade Practices Act)

15. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 14 as if fully set forth herein.

16. Plaintiffs and Defendants are persons engaged in trade or commerce as those terms are defined in S.C. Code Section 39-S-10.

17. After over fifteen years of a continuous business relationship in which Defendant Harris Teeter, Inc. sold Plaintiffs' barbecue products in it stores, Defendant wrongfully discontinued the sale of Plaintiffs products solely as a result of his exercise of free speech.

18. Defendant Jeff Lewis, as Harris Teeter, Inc. store manager, wrongfully removed Plaintiff's products from his store shelves

solely as a result of Plaintiff's exercise of free speech.

19. Defendant Harris Teeter, Inc. knowingly engaged in an unlawful trade practice and violated S.C. Code Section 39-S-20 when it took retaliatory action against Plaintiff for his exercise of free speech. A trade practice is unlawful when it is offensive to public policy, immoral, unethical, or oppressive. One of the most fundamental public policies in this state is freedom of speech.

20. Defendant Jeff Lewis knowingly engaged in an unlawful trade practice and violated S.C. Code Section 39-S-20 when he took retaliatory action against Plaintiff for his exercise of free speech. A trade practice is unlawful when it is offensive to public policy, immoral, unethical or oppressive. One of the most fundamental public policies in this state is freedom of speech.

21. Defendant Harris Teeter, Inc.'s actions have an effect on the public interest and are capable of repetition. Defendant stores carry a multitude of products with vendors, manufacturers, and makers whose free exercise of speech is threatened by possible retaliatory action to remove their business products if the Defendant does not like or agree with the content of the product maker's speech.

22. Defendant Jeff Lewis's actions have an effect on the public interest and are capable of repetition. Defendant's store caries a multitude of products with vendors, manufacturers, and makers whose free exercise of speech is threatened by possible retaliatory action to remove their business products if the Defendant does not like or agree with the content of the product maker's speech.

23. Defendant Harris Teeter, Inc.'s actions are also capable of repetition because the real and substantial removal of each individual product is an unfair act and over two thousand bottles of Plaintiffs' barbecue sauce alone were removed from the shelves of Defendant stores.

24. Defendant Jeff Lewis's actions are also capable of repetition because the real and substantial removal of each individual product is an unfair act and dozens of bottles of Plaintiffs' barbecue sauce were removed from the shelves of Defendant's store.

25. Defendant Harris Teeter, Inc. acted willfully and intentionally when it intentionally removed Plaintiffs' products from its stores in retaliation for Plaintiff's exercise of free speech.

26. Defendant Jeff Lewis acted willfully and intentionally when he intentionally removed Plaintiffs' products from his store in retaliation for Plaintiff's exercise of free speech.

27. Plaintiffs have suffered actual, ascertainable losses as a direct and proximate result of Defendant Harris Teeter, Inc.'s actions in excess of fifty thousand dollars annually, without adjusting for inflation, for each year that Defendant continues to refuse to sell Plaintiffs' products.

28. Plaintiffs have suffered actual, ascertainable losses as a direct and proximate result of Defendant Jeff Lewis's actions in excess of fifty thousand dollars annually, without adjusting for inflation, for each year that Defendant continues to refuse to sell Plaintiffs' products.

WHEREFORE, Plaintiffs respectfully pray for judgment as follows:

a. That Plaintiffs be awarded actual damages for past and future losses in the amount of four million dollars;

b. That Plaintiffs be awarded three times the amount of actual damages;

c. That Plaintiffs be awarded punitive damages;
d. That Plaintiffs be awarded attorney fees and costs of this action; and

e. That Plaintiffs be awarded all other general equitable relief as the law and facts may warrant; and such other and further relief as the Court deems just and proper.

FURTHER, WHEREFORE, Plaintiffs demand a jury trial.

By: /s/

Glen W. La Force, Sr.
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Hilton Head Island, SC 29928
(843) 785-5881

Attorney for Plaintiffs

August 1, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

MAURICE BESSINGER, and PIGGIE PARK ENTERPRISES, INC.,	)	
Plaintiffs;	)	Civil Action No. 2:03-3153-17
v.	)	
HARRIS TEETER, INC., and RANDY RASMUSSEN,	)	
Defendants.	)	

STATE OF NORTH CAROLINA)
COUNTY OF MECKLENBURG)

AFFIDAVIT OF RANDAL P. RASMUSSEN

I, Randal P. Rasmussen, give the following affidavit:

1. I am over the age of 18 and fully competent to give this affidavit.

2. From approximately April, 2000 until approximately March, 2001, I worked as one of three Co-Managers, serving under the store manager, at

Harris Teeter Store No. 28, on 675 Folly Road in Charleston, South Carolina.

3. As Co-Manager, my area of responsibility consisted of the perishable food sections of the store-fresh meat, produce, and the deli.

4. During my tenure as Co-Manager of Store No. 28, I was not responsible for frozen foods or bottled condiments.

5. I did not participate in any way in the decision of Harris Teeter to discontinue the products of Maurice Bessinger or Piggie Park Enterprises, Inc.

6. I did not participate in any way in the actual removal of any products of Maurice Bessinger or Piggie Park Enterprises, Inc., from Store No. 28 or any other Harris Teeter Store.

7. I left Store No. 28 in March 2001, to become the Store Manager of the Harris Teeter store on Long Point Road, in Charleston, South Carolina.

8. Since March 2001, I have continuously worked in the position of Store Manager in various Harris Teeter stores in Charleston County, South Carolina.

9. During the time in which I have worked for Harris Teeter, neither Store Managers nor Co-Managers have had the authority to continue carrying products after being advised to discontinue such products by Harris Teeter corporate management.

10. I have given this affidavit freely and voluntarily. No one has promised me anything or threatened me in any way to obtain this statement from me. The statements contained in this affidavit are my own and are true to the best of my knowledge. This affidavit is based on my personal knowledge.

Dated this the 6th day of November, 2003.

Randal P. Rasmussen

Randall P. Rasmussen

Sworn to and subscribed before me
this the 6th day of November, 2003.

Don Edwards

Notary Public

(Seal)

NOTARY PUBLIC FOR SOUTH CAROLINA
My commission expires September 2, 2009

My commission expires:_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

MAURICE BESSINGER, and PIGGIE PARK ENTERPRISES, INC.,	)	
Plaintiffs;	)	Civil Action No. __
v.	)	
HARRIS TEETER, INC., and RANDY RASMUSSEN,	)	
Defendants.	)	

ATTACHMENT B

to

NOTICE OF REMOVAL

Affidavit of C. Douglas Rhodes

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

MAURICE BESSINGER, and PIGGIE PARK ENTERPRISES, INC.,	)	
Plaintiffs;	)	Civil Action No. __
v.	)	
HARRIS TEETER, INC., and RANDY RASMUSSEN,	)	
Defendants.	)	

STATE OF NORTH CAROLINA	)	
	)	AFFIDAVIT OF
COUNTY OF MECKLENBURG	)	C. DOUGLAS RHODES

I, C. Douglas Rhodes, give the following affidavit:

1. I am over the age of 18 and fully competent to give this affidavit

2. I am employed by Harris Teeter, Inc., as Senior Vice President Human Resources since 1997.

3. Harris Teeter, Inc. is a corporation organized and existing under the laws of North

Carolina and with its principal place of business in North Carolina.

4. I have reviewed the appropriate Company documents to research the date upon which the Harris Teeter, Inc. store located at 620 Long Point Road, Mount Pleasant, South Carolina opened. The store located at 620 Long Point Road, Mount Pleasant, South Carolina opened on May 16, 2001.

5. Harris Teeter, Inc., did not operate or own a store at 620 Long Point Road, Mount Pleasant, South Carolina, in the year 2000.

6. I have given this affidavit freely and voluntarily. No one has promised me anything or threatened me in any way to obtain this statement from me. The statements contained in this affidavit are my own and are true to the best of my knowledge. This affidavit is based on my personal knowledge.

Dated this the 2nd day of October, 2003.

/s/ C. Douglas Rhodes
C. Douglas Rhodes

Sworn to and subscribed before me
This the 2nd day of October, 2003.

/s/ Notary Public
Notary Public
(Seal)

My commission expires: 5/29/02